No. 94-1324

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

MAR 1 1995
OFFICE OF THE CLERK

PETER W. SLUYS,

Petitioner,

ARTHUR R. ALDRICH,

Petitioner,

vs.

JOHN T. GRANT,

Respondent,

KENNETH GRIBETZ, as District Attorney of the County of Rockland, and KENNETH GRIBETZ, personally, PETER MODAFFERI and SIX OTHER UNKNOWN CONSPIRATORS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT KENNETH GRIBETZ'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RICHARD J. SCHAEFFER
Counsel of Record
DORNBUSH MENSCH MANDELSTAM & SCHAEFFER, LLP
Counsel for Respondent Kenneth Gribetz
747 Third Avenue
New York, New York 10017
(212) 759-3300

Of Counsel:
PETER J. VENAGLIA
JEFFREY STRANK

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QUESTION PRESENTED

Did the District Court and Second Circuit properly dismiss as moot this action -- which had been commenced in order to enjoin Petitioners' prosecution -- after the District Court found that there had been no violation of Plaintiffs' rights to date and after Defendant Gribetz then indicated that there would be no prosecution of Petitioners?

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PRELIMINARY STATEMENT

Respondent Kenneth Gribetz submits this Brief in opposition to the Petition for a Writ of Certiorari filed by Petitioners Peter W. Sluys and Arthur R. Aldrich ("Petitioners"). As discussed below, Judge Charles L. Brieant, of the Southern District of New York, properly dismissed this action on the grounds of mootness. The Second Circuit thereafter affirmed Judge Brieant's dismissal of this action.

Petitioner Peter W. Sluys commenced this action in order to seek a preliminary injunction enjoining any prosecution of him by the Rockland County District Attorney's office.[1] Judge Brieant denied Petitioner's motion since no indictment had yet been issued by the District Attorney's office, declaring that "[t]here's no indication of anything inappropriate up till now." At the same time, Judge Brieant indicated that Petitioner Sluys would have the right to seek further relief in the event that a prosecution was actually commenced against him.

Subsequently, however, Defendant Gribetz announced that there would be no prosecution of Petitioners by the Rockland County District Attorney's office. The District Court thereafter issued its Decision and Order dismissing this case as moot.

The fact is that Petitioners commenced this action in order to prevent their prosecution by the Rockland County District Attorney's Office. Defendant Gribetz has indicated that there will be no such prosecution, and therefore there is now no longer -- if there ever was -- any live action or

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[1] As set forth below, after Petitioner Sluys commenced this action, Petitioner Aldrich intervened as a party Plaintiff seeking the same relief as Petitioner Sluys.

controversy which would warrant continuation of the proceedings. While Petitioners continue to argue that Judge Brieant concluded that their constitutional rights had been violated, the Second Circuit correctly observed that "Judge Brieant found that appellants' rights had not been violated [and that therefore] the basis of their appeal is mistaken." Second Circuit Decision at 4a.

Accordingly, Petitioners' appeal is entirely meritless, and the Judgment of the District Court and the Opinion of the Second Circuit should be affirmed.

STATEMENT OF THE CASE[2]

Background

During the summer of 1993, the Rockland County District Attorney's office was in the process of conducting an investigation into a variety of matters. The investigation involved, among other things, a review of a number of transactions, including payments made by Orange & Rockland Utilities ("O&R") to Community Media, Inc. ("Community Media"), the company for which Petitioner Sluys is the Managing Editor and Petitioner Aldrich is the Publisher.

Pursuant to this investigation, a Superior Court Information was issued with respect to Linda Winikow, a former Vice-President of O&R. The Information made specific reference to Ms. Winikow's agreement, in violation of Section 180.05 of the Penal Law (commercial bribe receiving

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[2] Petitioners' Statement of the Case contains a number of "facts" which are not part of the Record, many of which are irrelevant, inaccurate or both. Plaintiffs are simply seeking to deflect this Court's attention from the unassailable and quite straightforward facts which led Judge Brieant to dismiss this action and the Second Circuit to affirm that dismissal.

in the second degree), to enter into advertising contracts with Community Media on behalf of O&R. In return, Community Media would cease negative press coverage about O&R.

On October 6, 1993, Ms. Winikow pled guilty to several charges, including the charge of commercial bribe receiving in the second degree relating to the advertising contracts with Community Media. In entering her plea on the charge, Ms. Winikow confirmed that she had entered into advertising contracts on behalf of O&R with Community Media in return for Community Media's promise to cease negative press coverage of O&R.

Ms. Winikow also allocuted that the contract was entered into pursuant to discussions she had held with representatives of Community Media, including Petitioners Sluys and Aldrich. Ms. Winikow admitted that she "never would have" entered into this contract were it not for the promise by Community Media to cease negative media coverage of O&R and its principals.

In view of the evidence surrounding the investigation into the transactions involving O&R which resulted in Ms. Winikow's guilty plea, a grand jury with respect to these and other matters was impaneled on October 5, 1993. The grand jury was in the process of assessing all of the evidence being presented to it when Petitioner Sluys commenced this action by moving for a preliminary injunction which would enjoin any prosecution against him by the District Attorney's office.[3]

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[3] Plaintiff Aldrich later intervened in this action as a party Plaintiff.

Petitioners' Motion for a Preliminary Injunction Is Denied

The motion for a preliminary injunction was fully briefed and was heard by Judge Brieant on October 25, 1993. Judge Brieant denied Petitioner Sluys' motion, indicating the motion was not "ripe" because "there's no indictment" and stating that "there's no indication of anything inappropriate up till now." *See* Second Circuit Opinion at 3a. Judge Brieant added that "it may be that you have a basis for some relief in this Court, but that would be anticipating the future," adding that he might revisit the issue in the event an actual prosecution was instituted.

Defendant Gribetz Decides Not to Prosecute Petitioners

Subsequently, in a statement issued on November 16, 1993, Defendant Gribetz made it clear that there would be no prosecution of Petitioners. In the press release announcing the decision not to prosecute Petitioners, the District Attorney's office stated as follows:

> District Attorney Kenneth Gribetz has announced that after fully reviewing the actions of Community Media and its employees in regard to its relationship to Orange and Rockland Utilities of Pearl River, New York, that the investigation is completed and no criminal charges will be filed against the corporation or its employees.
>
> After a thorough review of all of the evidence and discussions with numerous witnesses, the District Attorney's office has concluded that on constitutional grounds, particularly the First Amendment of the United States Constitution, Community Media or its employees, cannot be successfully prosecuted.

> Accordingly, the investigation is closed and matters related to the relationship of Orange and Rockland Utilities and Community Media will not be presented to a Rockland County grand jury for their review and consideration.

As this statement made clear, the Rockland County District Attorney's office had simply done its job: it had investigated the facts, including the facts surrounding Ms. Winikow's guilty plea, and concluded that no criminal charges would be brought against Petitioners or Community Media.

Justice Brieant Dismisses The Action as Moot

In view of the decision by the District Attorney's office not to prosecute Petitioners, Judge Brieant issued a Memorandum and Order dated November 17, 1993 in which the Court invited the parties to show cause why the action should not be dismissed as moot. The parties in fact appeared before Judge Brieant on December 8, 1993 in order to address this issue.

By Decision and Order, dated January 31, 1994, Judge Brieant, citing the decision of the District Attorney's office not to prosecute Petitioners, dismissed this action with prejudice on grounds of mootness. Judgment was entered on January 31, 1994 dismissing this action.

The Second Circuit Affirms Justice Brieant's Dismissal of This Action

By way of a Decision dated September 29, 1994, the Second Circuit affirmed Justice Brieant's Decision. In so doing, the Second Circuit made it clear that Judge Brieant had found "that no constitutional violation had occurred in the incipient stages of the investigation ...." Second Circuit Opinion at 2a. Indeed, the Second Circuit stated as follows:

> There was *no* finding that Plaintiffs' constitutional rights were violated: on the contrary, Judge Brieant

> found that, as the investigation has scarcely begun, the plaintiffs' rights had not been violated. The court stated, "One of the problems is that nothing, as far as I can see, has happened to [plaintiffs] ... [T]here's no indication of anything inappropriate up till now.

Second Circuit Opinion at 3a (emphasis in original).

ARGUMENT

THE SECOND CIRCUIT CORRECTLY AFFIRMED JUDGE BRIEANT'S DISMISSAL OF THIS ACTION ON GROUNDS OF MOOTNESS.

The related doctrines of ripeness and mootness are rooted in Article III of the Constitution, as well as principles of judicial economy. In either case, federal courts will not retain jurisdiction over matters which do not present a live action or controversy.

The Supreme Court has established a clear standard for determining whether a case is ripe:

> Basically, the question in each case is whether ... there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941). In applying this standard, the Supreme Court, in *Juidice v. Vail*, 430 U.S. 327 (1977), stated that since many of the individuals involved in that case were no longer threatened with criminal prosecution, a live controversy no longer existed as to them.

With respect to the doctrine of mootness, this Court has stated:

> A case becomes moot "when the issues presented are no longer 'live' or the parties 'lack a legally

> cognizable interest in the outcome.' " (*Blackwelder v. Safnauer*, 866 F.2d 548, 551 (2d Cir. 1989)) (quoting *Murphy v. Hunt*, 455 U.S. 478, 481, 102 S. Ct. 1181, 1183, 71 L.Ed.2d 353 (1982) (per curiam)); *see also Jefferson v. Abrams*, 747 F.2d 94, 96 (2d Cir. 1984). When this occurs, the Constitution's case or controversy requirement, U.S. Const. Art. III, § 2, is not satisfied and a federal court lacks subject matter jurisdiction over the action. (citations omitted). A moot action therefore must be dismissed, even if the case was live at the outset but later events rendered it moot .... *see Jefferson*, 747 F.2d at 96.

New York City Employees' Retirement System v. Dole Food Co., 969 F.2d 1430, 1433 (2d Cir. 1992). *See also Cook v. Colgate University*, 992 F.2d 17 (2d Cir. 1993); *Fox v. Board of Trustees of the State University of New York*, 148 F.R.D. 474, 483 (N.D.N.Y. 1993), *aff'd* 42 F.3d 135 (2d Cir. 1994) ("[W]hen an action becomes moot, it no longer presents a live case or controversy, and thus ... a federal court *must* dismiss that case because it lacks subject matter jurisdiction to entertain it.") (emphasis added).

Here, Petitioners are attempting to resuscitate a case which is not -- if it ever was -- ripe. This case was brought to prevent Petitioners' prosecution, and the Rockland County District Attorney's office has now confirmed that there will be no such prosecution. Accordingly, the purpose for this action no longer exists, and Judge Brieant correctly dismissed this action on grounds of mootness.

As the Second Circuit Opinion notes, Petitioners' attempt to reactivate this case despite the fact that the case is clearly moot is premised upon a fundamental misinterpretation of Judge Brieant's Decision. While Petitioners would have this Court believe that Judge Brieant somehow found that Petitioners' constitutional rights have been violated, Judge

Brieant made no such determination. To the contrary, the very point of Judge Brieant's Decision is that, in view of the indication that Petitioners would not be prosecuted by the Rockland County District Attorney's office, there can and will be no violation of Petitioners' rights. Indeed, while Petitioners' Petition states "that the District Attorney had committed offenses which violated the civil rights of your Petitioners," (Petition at 14) the Second Circuit made it clear that Judge Brieant had expressly "found that appellants' rights had not been violated." Second Circuit Opinion at 4a.

When Petitioner Sluys (before Petitioner Aldrich intervened as a party) sought a preliminary injunction at the time this action was commenced, Judge Brieant properly denied the motion for a preliminary injunction, noting that no indictment had yet been handed up, specifically stating that "there's no indication of anything inappropriate up till now." Second Circuit Decision at 3a. In other words, at the time the matter was brought before Judge Brieant by Petitioner Sluys -- *after* the investigation concerning the relevant events had been commenced by the Rockland County District Attorney's office and *after* the grand jury had been impaneled -- Judge Brieant found that there had been no wrong committed to that point.

The investigation by the Rockland County District Attorney's office concerning the transactions between Community Media and O&R resulted in a guilty plea by Ms. Winikow to commercial bribe receiving in the second degree. As the chief law enforcement officer in Rockland County, Mr. Gribetz was, of course, duty bound to conduct a full investigation into the circumstances surrounding those transactions. It goes without saying that an investigation into events cannot be equated with an actual prosecution of an individual: it is normal and expected that, as happened here, investigations will be conducted which in the end do not result in any prosecution.

The clear import of Judge Brieant's Decision was that had an actual prosecution been commenced against Petitioners, their First Amendment rights may have been implicated. It was for this very same reason that Defendant Gribetz determined that no prosecutions would be pursued against Petitioners.[4] As such, there was at no time any violation of Petitioners' constitutional rights.

Accordingly, each of the cases cited and relied upon by Petitioners are readily distinguishable. In each of those cases, the issue was the relief available in the event that a finding were made that there had been a violation of the constitutional rights of the plaintiffs. *See, e.g., Farrar v. Hobby*, 506 U.S. _____, 113 S. Ct. 566 (1992) (damages premised on finding of violation of civil rights); *Carey v. Piphus*, 435 U.S. 247 (1978) (plaintiffs' rights had already been violated and therefore damage claim allowed to proceed); *Davis v. Village Park II Realty Co.*, 578 F.2d 461 (2d Cir. 1978) (damage claim allowed to proceed where an action had already been commenced by the defendant and where a violation of Petitioner's rights had already occurred).

Here, on the other hand, there has been no violation of Petitioners' rights and there will be no violation of their rights due to the decision which has been made not to prosecute Petitioners.[5] In these circumstances, Judge Brieant correctly concluded that there was no longer any live action

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[4] The outright confirmation that there will be no prosecution of Plaintiffs distinguishes this action from the cases where the imminent threat of prosecution made those cases ripe for adjudication.

[5] At any rate, a state prosecutor is entitled to absolute immunity with respect to § 1983 damage liability for acts relating to his role as advocate for the State and officer of the courts. *See Imbler v. Pachtman*, 424 U.S. 409 (1976).

or controversy before him and therefore properly dismissed this case on grounds of mootness.

Equally unavailing is Petitioner's attempt to rely upon Judge Brieant's reference to the Petitioners as potentially being "prevailing parties" who, if they had been represented by an attorney, might be entitled to recovery of attorneys' fees. As the Second Circuit made clear, Petitioners incorrectly imply that Judge Brieant's statement somehow constitutes a finding that there had been a violation of their rights. Instead, as the Second Circuit noted, the reason for Judge Brieant's statement is simply that "by bringing their suit, [Petitioners had] accomplished at least one of [their] goals." Second Circuit Opinion at 4a. However, this does not change the fundamental fact that Judge Brieant had already found that Petitioners' rights had not been violated.

CONCLUSION

Judge Brieant properly dismissed this action -- commenced to prevent Petitioners' prosecution -- on grounds of mootness. In view of the indication by the Rockland County District Attorney's office that there will be no prosecution of the Petitioners, no viable claim remains.

In turn, the Second Circuit correctly observed that Judge Brieant had found that Plaintiffs' constitutional rights had not been violated, and as a result affirmed Judge Brieant's dismissal of this action.

The Judgment of the District Court and the Second Circuit's Opinion should be affirmed in their entirety.

Dated: New York, New York
February 27, 1995

Respectfully submitted,

RICHARD J. SCHAEFFER
Counsel of Record
DORNBUSH MENSCH MANDELSTAM
& SCHAEFFER, LLP
Counsel for Respondent
Kenneth Gribetz
747 Third Avenue
New York, New York 10017
(212) 759-3300

Of Counsel:

PETER J. VENAGLIA
JEFFREY STRANK